STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-167

May 24, 2004

CENTRAL MAINE POWER COMPANY
Annual Price Change Pursuant to the
Alternative Rate Plan (Post Merger)

RULING ON
PROTECTIVE STATUS

I. SUMMARY

By way of this ruling, the Hearing Examiner upholds the objections of the Industrial Energy Consumer Group (IECG) and the Office of the Public Advocate (OPA) to Central Maine Power Company's (CMP) designation of the earnings and Return on Equity (ROE) information provided in response to ODR-02-09 as Designated Confidential Information under the terms of Protective Order No. 2.

II. BACKGROUND

On March 4, 2004, Central Maine Power Company (CMP or Company) filed a motion requesting that the Commission issue two temporary protective orders prior to the Company submitting its annual ARP filing as required under its ARP 2000 rate plan. *See Central Maine Power Company, Request for Approval of Alternative Rate Plan (Post Merger) "ARP 2000",* Docket No. 99-666, Order Approving Stipulation (Nov. 16, 2000). Proposed Temporary Protective Order No. 1 covers customer specific pricing data and proposed Temporary Protective Order No. 2 covers proprietary information regarding the costs of certain operational activities related to CMP's call centers and customer information system. In order to expedite the provision of this information to the Commission, the Hearing Examiner issued Temporary Protective Orders No. 1 and 2 on March 9, 2004, subject to reconsideration in light of arguments by any intervenor.

An initial case conference in this matter was held on April 1, 2004. At such time, the parties to the proceeding, the Office of the Public Advocate (OPA) and the Industrial Energy Consumers Group (IECG) were given an opportunity to object to extending the term of the temporary protective orders. There being no objection, Protective Orders No. 1 and 2 were made permanent subject to modification as described in the orders.

In response to ODR-02-09, the Company provided its return on equity (ROE) for calendar years 2001, 2002 and 2003, both with and without the Energy East merger acquisition premium. In its response, the Company claimed that the information provided constituted proprietary business information and therefore, should be considered confidential and protected under the terms and conditions of Protective Order No. 2. Protective Order No. 2 pertains to Proprietary Business Information and specifically information with the operational costs associated with the following four indicators:

1. Call center expenditures per customer served;
2. Full-time call center employees per customer served;
3. Customer information system investment per customer served; and,
4. Full-time customer information system employees per customer served.

Under the terms of Protective Order No. 2, such information is to be considered "Designated Confidential Information" and unless and until the order is modified, access to Designated Confidential Information" under Protective Order No. 2 is limited to the following individuals:

> "(i) Commission members, members of the Commission Staff and their consultants; (ii) the Public Advocate, counsel and their consultants; (iii) a stenographer or reporter recording any hearing in connection with this proceeding; (iv) counsel for any other representative of CMP; and (v) counsel for all parties -- not including counsel for so-called interested parties or counsel for any utilities who may file as parties or interested persons."

Any person receiving "Designated Confidential Information" may not disclose or reveal, directly or indirectly, content of the Designated Confidential Information to anyone other than another individual covered by the Order.

On May 10, 2004, as part of its list of proposed exhibits, the IECG objected to the designation of CMP's response to ODR-02-09 as confidential. The IECG argued that regulated public utility earnings have never been protected from public scrutiny and should not be transformed into "trade secrets" in this docket. In addition, the IECG argues that the earnings information which CMP seeks to protect is not within the purview of Protective Order No. 2 which it claims primarily applies only to the pricing of bids from outside vendors.

At a pre-hearing conference held on May 12, 2004, counsel for CMP argued that the information was declared confidential by CMP because it could be misconstrued if made available to the public. In addition, CMP argued that the ROE calculations could be performed by other parties using publicly available reports filed with the SEC and the FERC. CMP stated that it performed the ROE calculations based on its belief that the material would be kept confidential, In addition, CMP argued that the ROE information provided by CMP was not required to be provided under the terms of the ARP 2000 Stipulation. CMP also argued that it is not necessary to decide the issue of whether the response should be made publicly available at this time. Rather, the question can be addressed if and when the Commission receives a request for such information.

Counsel for the IECG did not appear at the May 12, 2004 pre-hearing conference. The OPA, however, supported the IECG's objection at such time and requested that the Examiner issue a ruling removing the response from protection.

III. APPLICABLE LAW

Pursuant to the provisions of 35-A M.R.S.A. §1311-A(1) the Commission may issue protective orders to protect the interests of the parties in confidential or proprietary information, trade secrets or similar matters as provided by the Maine Rules of Civil Procedure. In granting protective orders, the Commission shall balance the need to keep the information confidential with the policies of conducting its proceedings in an open and fair manner. The party requesting the protective order bears the burden of demonstrating the need for protection.

As set forth in the terms of Protective Order No. 2, the issuance of the order did not change the burden of proof otherwise established by law or create a presumption that the material claimed to be Designated Confidential Information by CMP under the terms of the order should remain subject to protection if challenged pursuant to the procedures set forth in the order.

IV. RULING

The Company claims that the earnings and ROE information provided in response to ODR-02-09 is Proprietary Business Information under the terms of Protective Order No. 2. which covers information related to CMP's call center and customer information system processes. The information provided in response to ODR-02-09 contains the Company's ROE calculation based upon reported financial information. Therefore, in the first instance, it would appear that the information claimed by CMP to be confidential under the terms of Protective Order No. 2 is beyond the scope of such order.

Even if we viewed the scope of Protective Order No. 2 broadly to cover any proprietary business information, the earnings and ROE information provided by CMP in response to ODR-02-09 cannot be viewed as Proprietary Business Information subject to the restrictions of Protective Order No. 2. Under the terms of the protective order, information which is publicly available will not be considered to be Designated Confidential Information subject to restricted access. According to CMP, the earnings and ROE calculations come from publicly available documents and the calculations could have been made by the Advisory Staff or some other party using such data. CMP cannot, by tying certain pieces of information together, or by doing some basic mathematical calculations, transform data available from its FERC and SEC reports into proprietary business information.

If what CMP is arguing here is that the ROE calculation required a "special study" and that they should not have been required to perform such a study under the rules of discovery, such an argument, at this point, would appear to be moot because the "special study" has already been conducted and been provided. Even if this objection had been raised prior to the completion of the calculation, it is difficult to imagine that

CMP or Energy East, would not regularly perform such calculations;[1] that performing such calculations caused or would cause an undue burden on CMP personnel, or that the Commission, pursuant to the provisions of 35-A M.R.S.A. § 112, would not be entitled to request that CMP provide such information.

We recognize that the utility industry has undergone dramatic changes over the past decade. Generation service is now subject to competition. In addition, many elements of the services that the utility provides can be provided by others or can be provided by the utility to others. Nonetheless, it must be remembered that T&D service remains a monopoly service subject to public regulation. As such, this Commission has an obligation to ensure that the rates charged by public utilities in this State are just and reasonable. While earnings are no longer the primary driver in setting utilities' rates under alternative rate plans such as ARP 2000, neither are such calculations irrelevant in the alternative ratemaking world. In approving the ARP 2000 Stipulation, the Commission noted that price-cap regulation was not tantamount to deregulation. In approving the ARP 2000 Stipulation the Commission, quoting from its Order approving CMP's first ARP stated:

> "No one should interpret our adoption of the Stipulation as a willingness to abandon our central regulatory task of ensuring that CMP's customers receive adequate service at just and reasonable rates."

Docket No. 99-666, Order Approving Stipulation at 13.

During the hearings on the ARP 2000 Stipulation, counsel for CMP, acknowledged that the Commission at any time seek to reset rates during the ARP and that CMP's earnings could, if consistently and sufficiently high, could provide the basis for such a resetting.[2] As such, we conclude that it is not only the Commission's right to obtain the information, but indeed the Commission's obligation to apprise itself of CMP's earnings position so that it can monitor whether the ARP is producing reasonable

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[1] Indeed, for calendar year 2003, and all years where earnings sharing was provided for under ARP 2000, it can reasonably be concluded that CMP had to have made these calculations in order to conclude, as it did in its annual filings, that the provision for low-end earnings sharing was not applicable.

[2] In response to questions from Commissioner Diamond on the Commission's authority to reset rates based on the Company's earnings during the course of the ARP CMP counsel responded:

"But you could reset rates. I mean I think as a matter of law you can reset rates. You have to start from that point, that you could do it. If you did it because we earned 11 1/2% and you decided you thought that was too high, I think that the Law Court might look at it very differently than if you reset rates because we earned 40% in three consecutive years. It becomes a factual question and a matter of degree."

Docket No. 99-666, Tr. H-100 (Sept. 13, 2000).

results. This monitoring should be done in the public view and with the essential elements in the ratemaking process, such as the regulated utility's earnings, being available to the public upon request unless the utility can make a compelling case why conducting the Commission's business in such a manner would truly reveal proprietary business information harmful to the Company's competitive business interests. Indeed, we have not been presented with any persuasive arguments here why the information provided in response to ODR-02-09 is proprietary business information which should not be made available to the public upon request.

The requests of the IECG and the OPA that the response to ODR-02-09 not be classified as Designated Confidential Information under the terms of Protective Order No. 2 are, therefore, granted.

Dated at Augusta, Maine, this 24th day of May, 2004.

BY ORDER OF THE HEARING EXAMINER

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Charles Cohen